BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANDREA D. CULWELL Claimant	)	
VS.	)	
EVANS BIERLY HUTCHISON & ASSOCIATES Respondent	)	Docket No. 1,063,390
AND	)	
TWIN CITY FIRE INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the March 24, 2014, Award entered by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on July 23, 2014. Kenton D. Wirth of Wichita, Kansas, appeared for claimant. Bruce L. Wendel of Overland Park, Kansas, appeared for respondent.

The ALJ found claimant sustained a 10 percent impairment of function to the body as a whole as a result of her work-related accident of October 20, 2011. Further, the ALJ determined claimant sustained a wage loss of 40.5 percent and a task loss of 73.3 percent, for a permanent partial general disability of 56.9 percent. The ALJ found claimant entitled to future medical treatment upon proper application, and he ordered claimant's outstanding medical paid as authorized.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent argues the ALJ's Award should be reversed, as the preponderance of the credible evidence supports the finding claimant incurred a permanent impairment rating of 10 percent to the body as a whole, with future medical treatment limited to treatment

related to claimant's spinal hardware. Respondent maintains claimant voluntarily resigned from her position at respondent and suffered no task loss and little or no wage loss as a result of the October 20, 2011, work-related injury.

Claimant contends the ALJ's Award should be affirmed. Alternatively, claimant argues she sustained a 75 percent wage loss and a 74 percent work disability as a result of her work-related injuries.

The issues for the Board's review are:

1. Did claimant voluntarily resign?

2. What is claimant's post-injury wage?

3. What is claimant's task loss?

FINDINGS OF FACT

Claimant was initially hired by respondent's office in Goodland, Kansas, in 2005 as an administrative assistant. In this position, claimant worked in the office at a desk doing paperwork, computer work, filing, carrying boxes, using the copy machine, and answering the phone. Between 2007 and 2009, claimant became certified to be an inspector for respondent. As an inspector, claimant reviewed construction sites and tested the density of concrete for construction projects. Claimant testified this was a physically demanding position which required bending, twisting, and lifting. By October 2011, claimant performed both inspector and administrative assistant job duties, with the bulk of her time spent as an inspector. Claimant earned $15.50 per hour in the full-time inspector position and received fringe benefits.

On October 20, 2011, claimant was testing concrete at a job site, and when she bent over to dump a bucket weighing approximately 42-46 pounds, she felt pain in her low back down into both legs. Claimant gave timely notice to respondent. Claimant explained she did not initially visit the hospital, but instead received treatment at a chiropractor and a clinic while continuing to work. She eventually underwent injections at Cheyenne County Hospital and was admitted on October 29, 2011. By October 31, 2011, claimant was transferred to Denver, Colorado, for treatment.

Claimant was admitted to Presbyterian/St. Luke's Medical Center in Denver, Colorado, on October 31, 2011. An MRI revealed a large L4-5 disc extrusion on the right, most likely representing a recurrence of herniation, and a smaller L5-S1 disc protrusion on the right. Claimant underwent a right L4-5 repeat diskectomy with Dr. Timothy Birney on November 1, 2011.

Claimant underwent right L4-5 and L5-S1 diskectomies with Dr. Birney in 2005 as a result of a 1999 motor vehicle accident. Claimant was provided postoperative physical therapy and fully recovered. Claimant indicated she had no low back difficulty and was under no treatment for her low back until the work-related incident of 2011.

Darin Neufeld, respondent's co-owner, vice-president, and the Goodland branch office manager, testified respondent issued a performance plan dated December 20, 2011, to claimant prior to her return to work. The plan was to return claimant to an accommodated position as a part-time administrative assistant for $12.25 per hour, as claimant could no longer perform the inspector position with her temporary postoperative restrictions. Mr. Neufeld stated claimant continued to receive her fringe benefits upon her return. Claimant worked for respondent in this accommodated position until March 2012, averaging 20 hours per week. Claimant testified she was provided with an adjustable drafting table and an ergonomic desk so she could sit or stand as needed.

On March 15, 2012, claimant underwent another surgery with Dr. Birney due to continuous low back pain. Dr. Birney performed a pedicle screw instrumentation from L4 to S1, without a fusion graft. Claimant was provided a brace, physical therapy, and permanent work restrictions following surgery. While claimant noted the surgeries helped her low back, she continued to suffer pain with occasional recurrent symptomatology in the lower extremities.

As part of her recovery, claimant was prescribed an ergonomic chair to be used at work. Claimant testified respondent was aware of her need for the chair and offered to provide the chair. Claimant was later informed respondent could not provide the chair, and instead she had to order the chair through workers compensation. By the time claimant left employment with respondent in August 2012, she had not received the ergonomic chair.

Claimant purchased The Flower Shop in St. Francis, Kansas, in August 2012. The Flower Shop is open from 8:30 a.m. to 6:00 p.m., Monday through Friday. Claimant testified she opens and closes the shop 3-4 days per week, though she does not work at least 1.5 days per week. Claimant stated she performs basic flower shop duties, but does not bend, twist, lift, or move heavy items. Claimant can adjust her position as needed, from sitting to standing to lying down. Claimant receives all profit from The Flower Shop. She testified the net profit in 2012 was $335.00.

Mr. Neufeld testified claimant voluntarily resigned from respondent in August 2012. Respondent offered claimant a permanent accommodated administrative assistant position with a guaranteed 30 hours per week at $12.25 per hour, with the same fringe benefits. Mr. Neufeld stated claimant was a good employee, and he would rehire her at any time. He noted respondent would accommodate claimant's position in any way necessary.

Claimant resides in St. Francis, Kansas, approximately 35 miles from respondent's office in Goodland. Claimant testified it takes about 30 minutes to drive this distance. Claimant testified she must stop her vehicle after 15 minutes and walk around for a time to alleviate her low back pain before continuing to her destination. Claimant indicated she is unable to do some of the duties she once performed as an administrative assistant, as she can not bend, twist or carry.

Photographs attached to the record of the regular hearing show claimant snow skiing, jumping in the air, going to the theater, and flying in the air while swing dancing.

Dr. Paul Stein, a board certified neurological surgeon, performed a court-ordered independent medical evaluation (IME) of claimant on July 25, 2013. Claimant complained of some pain in the lower back with occasional radiation and weakness in the right lower extremity. She told Dr. Stein she suffered some discomfort after walking. Additionally, claimant told Dr. Stein sitting and standing in one position are very painful, with sitting limited to only 15 minutes at a time. Dr. Stein reviewed claimant's history, medical records, and performed a physical examination. Dr. Stein concluded:

> [Claimant] sustained injury to the lower back at work on 10/20/11 resulting in an acute disc rupture at L4-L5. The primary or prevailing factor in the causation of symptoms and requirement for treatment, including the subsequent surgeries, was the incident at work. She is currently at maximum medical improvement and no further investigation or treatment is recommended.[1]

Using the AMA *Guides*,[2] Dr. Stein opined claimant has a 20 percent impairment to the body as a whole under DRE lumbosacral category IV based upon loss of motion segments from the pedicle screw instrumentation. He wrote, "This correlates well with the 24% assessed by Dr. Shemesh using the range of motion model. However, the *Guides* indicate when the range of motion model is used as a differentiator, the impairment itself comes from the closest DRE category."[3]

Claimant's 2005 lumbar surgery was not work-related and no functional impairment was officially assigned. Dr. Stein, using the *Guides*, determined claimant had a preexisting impairment of 10 percent under DRE lumbosacral category II. Therefore, according to Dr. Stein, claimant's functional impairment as a result of the October 20, 2011, work incident is 10 percent to the body as a whole.

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[1] Stein Depo., Ex. 2 at 6.

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[3] Stein Depo. Ex. 2 at 6.

Dr. Stein recommended the following permanent restrictions:

> 1. No lifting more than 15 pounds very occasionally, 10 pounds occasionally, and avoid repetitive lifting. 2. No lifting from below knuckle height or above chest height. 3. No repetitive bending and twisting of the lower back. 4. Have the opportunity to alternate standing, sitting, and/or walking on a 30-minute basis. If sitting, have the opportunity to move around in the chair.[4]

Karen Terrill, a vocational rehabilitation consultant, interviewed claimant via telephone per her counsel's request on February 19, 2013. On February 24, 2013, Ms. Terrill produced a list of 15 unduplicated tasks claimant performed in the 5 years preceding the 2011 work-related incident. Ms. Terrill generated an updated report on August 13, 2013, following her receipt of Dr. Stein's IME. Claimant's 15 unduplicated tasks remained unchanged.

Dr. Stein reviewed the task list generated by Ms. Terrill. Of the 15 unduplicated tasks on the list, Dr. Stein opined claimant could perform 4, for a 73.3 percent task loss. Dr. Stein later testified claimant could perform an additional two tasks on the list, but only if she was allowed to change positions as required per her restrictions.

Claimant has worked only at The Flower Shop since leaving employment with respondent. Claimant testified she has not applied for unemployment, short-term disability, long-term disability, Social Security disability, or any other disability through the State of Kansas.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-510e(a)(2) states, in part:

> (C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:
>
> (i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½ % to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and
>
> (ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

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[4] *Id*.

In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

. . . .

(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

(i) To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.

. . . .

(iii) The injured worker's refusal of accommodated employment within the worker's medical restrictions as established by the authorized treating physician and at a wage equal to 90% or more of the pre-injury average weekly wage shall result in a rebuttable presumption of no wage loss.

ANALYSIS

1. Did claimant voluntarily resign?

Claimant argues she could not accept an accommodated position with respondent because, among other things, she had a 15-minute sitting restriction and could not drive 35 miles to work. The Board does not accept claimant's argument. Dr. Stein opined claimant could sit for 30 minutes without changing position. The photographs attached to the record of the regular hearing show claimant snow skiing, jumping in the air, going to the theater, and flying in the air while swing dancing, are inconsistent with claimant's argument that she cannot drive to work.

Claimant also argues respondent did not provide the ergonomic chair required to complete the accommodation of the administrative position. Mr. Neufeld testified the chair would have been obtained. While the record reveals some confusion related to obtaining the chair and communications between the claimant, respondent and insurance carrier, the Board finds a chair would have been made available to claimant had she accepted the accommodated position.

The evidence supports a finding claimant voluntarily resigned to operate a flower shop. Claimant was offered accommodated employment at fewer hours per week and a lower hourly wage. However, since the job that was offered did not pay 90 percent or more of her pre-injury average weekly wage, there is no presumption of no wage loss. K.S.A. 2011 Supp. 44-510e(a)(2)(E)(iii) does not apply.

2. What is claimant's post-injury average weekly wage?

The ALJ determined claimant suffered a 40.5 percent wage loss. The ALJ based claimant's post-injury average weekly wage on respondent's offer of accommodated employment of 30 hours per week at $12.25 per hour. The ALJ did not include fringe benefits. In a letter to claimant, Mr. Neufeld noted claimant would be started at 20 hours per week, then increased to up to 30 hours per week until she could work more, indicating that 40 hours could be possible. Mr. Neufeld testified claimant was guaranteed a minimum of 30 hours per week, with fringe benefits.

Respondent argues claimant's post-injury wage should be based upon the gross profits of her flower shop, which would result in no wage loss. Claimant argues that the post-injury wage should be based upon The Flower Shop's net profit, as shown in claimant's 2012 Schedule C. The Board rejects both arguments.

Even if the Board accepts claimant made only $335.00 in 2012, the amount will not be adopted by the Board as a basis for calculating claimant's wage loss. While K.S.A. 2011 Supp. 44-510e(a)(2)(E) creates a rebuttable presumption that the average weekly

wage an injured worker is actually earning constitutes the post-injury average weekly wage, the presumption has been overcome by the offer of accommodated work and claimant's voluntarily resignation. Additionally, since claimant's wage loss was caused by her voluntarily resignation, adopting the flower shop income as a basis for wage loss is barred by K.S.A. 2011 Supp. 44-510e(a)(2)(E)(i).

Pursuant to K.S.A. 2011 Supp. 44-510e(a)(2)(E), wage loss is the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. Claimant's stipulated average weekly wage, with fringe benefits, was $758.89 per week. Included in this amount is $141.57 in fringe benefits. The stipulation was made in writing on January 23, 2014 and at the regular hearing.

The fringe benefits include $58.62 for a health savings account, $57.91 for insurance benefits, and $25.04 for a 401(k) contribution. Claimant is capable of working 30 hours per week at the rate of $12.25 per hour, or $367.50 per week, plus $141.57 in fringe benefits, for a total post-injury wage of $509.07. Fringe benefits are included in the post-injury wage because the offer of employment made to claimant by respondent included fringe benefits. The Board modifies the ALJ's finding of a 40.5 percent wage loss to reflect a 32.9 percent wage loss.

3. What is claimant's task loss?

Respondent argues claimant has no task loss, effectively ignoring claimant's compensable lumbar diskectomy and hardware placement. The Board disagrees. The only evidence of task loss in the record is from Dr. Stein. Dr. Stein initially opined, and the ALJ found, claimant could no longer perform 73.3 percent of her prior work tasks. Respondent, on cross-examination, persuaded Dr. Stein to say claimant could perform tasks number 7 and 8, with accommodation.

Task loss means the loss of the ability to perform the work tasks the employee performed, not the loss of the ability to perform the work tasks the employee performed if accommodated. The Board finds Dr. Stein's uncontradicted testimony persuasive. Claimant can no longer perform 73.3 percent of her prior work tasks.

CONCLUSION

Claimant refused an accommodated position with respondent within her restrictions and voluntarily resigned her employment with respondent. Claimant suffers a 53.1 percent work disability as a result of her work-related injury with respondent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated March 24, 2014, is modified to reflect a work disability of 53.1 percent. The Award is affirmed in all other respects.

As of September 1, 2014, there would be due and owing to the claimant 34.47 weeks of temporary total disability compensation at the rate of $404.96 per week or $13,353.07,[5] plus 130.24 weeks of permanent partial disability compensation at the rate of $505.95 per week in the sum of $65,894.93, for a total due and owing of $79,248.00, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $50,752.00 shall be paid at the rate of $505.95 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of August 2014.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

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John D. Clark, Administrative Law Judge

[5] The temporary total disability rate and total paid were stipulated to by the parties. The parties' calculations are inconsistent with the record, but adopted by the Board pursuant to the stipulation.